SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR)

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Succession of Mrs. Irene Scott Chotin (Joseph Scott Chotin, Testamentary Executor) respectfully petitions this Honorable Court for a writ of certiorari to review a judgment and opinion of the United States Court of Claims rendered in this cause on April 20, 1973; Motion for New Trial and Rehearing was denied by Order issued July 13, 1973.

I. OPINIONS BELOW

The Report of the Trial Commissioner to the United States Court of Claims appears as Appendix A. The United States Court of Claims affirmed the Trial Comm'r's. Opinion

by Order dated April 20, 1973 (Appendix B), and on July 13, 1973, denied petitioner's Motion for New Trial and Rehearing (Appendix C).

II. JURISDICTION

The date of the judgment sought to be reviewed is an Order dated April 20, 1973; Motion for New Trial and Rehearing was denied on July 13, 1973. The jurisdiction of the Court is invoked under Title 28, Section 1255 of the United States Code.

III. QUESTION PRESENTED

Two years, one month, and nineteen (19) days before her death, Mrs. Irene Scott Chotin made donations to four trusts created for the benefit of the children of her only child. The question is whether the gifts were made in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code.

IV. STATUTES AND REGULATIONS

Title 26, Section 2035 of the United States Code provides:

> "(a) General rule - The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.
>
> (b) Application of general rule - If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an

> adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but non such transfer, relinquishment, exercise, or release made before such 3 years period shall be treated as having been made in contemplation of death."

Treasury Regulations Section 20.2035-1 provide in pertinent part:

> "(c) Definition - The phrase 'in contemplation of death', as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer 'in contemplation of death' is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition."

V. STATEMENT OF CASE

Decedent, Mrs. Irene Scott Chotin, was the wife of Joseph Chotin; decedent had only one child, Joseph Scott Chotin, and only four grandchildren. Decedent was devoted to her family and manifested her great interest in and concern for all of her grandchildren by regularly giving them material things of value, including, among others, money, clothes, vacation travel, etc. In furtherance of her desire to provide for her grandchildren, on December 21, 1962, decedent and her husband made donations of all of the stock which she and her husband owned in two family corporations to four trusts, one for the benefit of each grandchild. The total value of the said gifts by decedent and her husband was $407,120.00 and gift taxes in the total amount of $85,692.00 were paid thereon. The stock was represented by voting trust certificates and was community property, decedent having only an undivided one-half interest therein, which was reported on the gift tax return for 1962 filed by decedent. The remaining one-half interest belonged to decedent's spouse, and the gift thereof was likewise reported on his gift tax return for 1962.

Following decedent's death on February 10, 1965, a federal estate tax return was filed; decedent's gross estate, as reported, was $1,409,897.00; of this, the value of decedent's interest in the family businesses totaled $1,110,342.00; real estate, $90,084.00; readily marketable securities, $81,412.00; cash and mortgages, $113.205.00; miscellaneous assets, $14,854.00; and federal and state death taxes amount to $427,270.00 on decedent's estate, not including the additonal taxes paid as the result of the audit of the federal estate tax return.

The said federal estate tax return was audited by Internal Revenue Service and, solely on the basis of Section 2035 of the Internal Revenue Code, included in decedent's estate $410,061.73 as the value of decedent's interest in the stock which had been donated by decedent and her husband on December 21, 1962. Plaintiff paid the deficiency which resulted from the increase in decedent's estate created by the inclusion of the donated property therein, and duly filed suit for recovery thereof.

The Trial Commissioner's decision that the gifts had been made in contemplation of death was adopted by the full Court and a Motion for New Trial and Rehearing was denied.

The basis for Federal jurisdiction in the United States Court of Claims is Title 28, Section 1346(a)(1) of the United States Code.

VI. REASONS FOR GRANTING WRIT

The reasons relied on for allowance of the Writ are as follows:

First, the decision of the United States Court of Claims is in conflict with the decision of this Court in the case of United States v. Wells, 283 U.S. 102(1930). In the Wells case, the government had argued that "the statutory presumption may be overcome only by proof that the decedent's purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death." (283 U.S. at 114) However, this Court pointed out:

"The quality which brings the transfer

within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax... As the transfer may otherwise have all the indicia of a valid gift inter vivos the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor."

(283 U.S. p. 116, 117)
(Emphasis Supplied)

The Trial Commissioner erroneously substituted his own state of mind for the state of mind of the donor, contrary to the rule announced by this Court in the opinion quoted above, and the Trial Commissioner erroneously concluded that the decedent's bad health prevented petitioner from establishing that the primary motives were life motives. (Appendix A, p. 12).

Secondly, the Treasury Regulations (§20. 2035-1) defining a transfer in contemplation of death state that it is a transfer "prompted by the thought of death". A transfer is so prompted if (1) made to avoid death taxes, (2) made as a substitute for a testamentary disposition, or (3) made for any other motive associated with death. The case of Allen v. Trust Co., 326 U.S. 630 (1946), does not support the Trial Commissioner's conclusion that "plaintiff must prove that life motives were the dominant controlling or impelling reasons for the transfer." (Appendix A, p. 10) The life motives found to be present in that case merely overcame the tax avoidance motive which taxpayer, in that case, admitted was the reason for certain changes in the trusts in question.

Where, as in this case, the donor did not have estate tax saving motives, nor a testamentary frame of mind, nor any death-associated motives, the gifts in question cannot be said to have been in contemplation of death.

Accordingly, it is respectfully submitted that review by this Court should be had to correct the erroneous interpretation of the decision of this Court in U.S. v. Wells, 283

U.S. 102 (1931).

VII. CONCLUSION

For the reasons stated above, the decision of the United States Court of Claims should be reviewed by this Court. The opinion of the Trial Commissioner, adopted by the full Court, inaccurately states the law with respect to transfers in contemplation of death. The petition for a Writ of Certiorari should therefore be granted.

WHEREFORE, the Succession of Mrs. Irene Scott Chotin (Joseph Scott Chotin, Testamentary Executor), petitioner, prays that a Writ of Certiorari issue to review the decision of the United States Court of Claims in the above entitled case.

(ORIGINAL SIGNED)
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APPENDIX A

In the United States Court of Claims

Nos. 266-69 and 879-71

(Filed AUG 24 1972)

ESTATE OF MRS IRENE SCOTT CHOTIN (JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR) v. UNITED STATES

REPORT OF THE COMMISSIONER TO THE COURT*

C. Ellis Henican, attorney of record, for plaintiff.
John E. Evans, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Philip R. Miller* and *Joseph Kovner*, of Counsel.

OPINION

SCHWARTZ, *Commissioner:* In these suits for refund of estate taxes paid by the estate of Irene Scott Chotin, the question is whether gifts in trust to decedent's four grandchildren, made within 3 years of her death in 1965, were gifts "in contemplation of death" within the meaning of section 2035 of the Internal Revenue Code of 1954. The gifts having in the words of the section been made "within a period of 3 years ending with the date of [her] death," "shall, unless shown to the contrary, be deemed to have been made in contemplation of death." Plaintiff "must show by a preponderance of the evidence, that the transfer was not made in contemplation of death." *Landorf* v. *United States*, 187 Ct. Cl. 99, 117, 408 F. 2d 461, 472 (1969). The required showing has not been made.

Mrs. Chotin died on February 10, 1965 in her 80th year,

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).

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while she was in the hospital recovering from a gastrointestinal upset. The cause of death was "acute heart failure due to long-standing arteriosclerotic and hypertensive heart disease." Twenty-six months earlier, on December 21, 1962, she had, jointly with her husband, made gifts of shares of stock in family corporations in trust for each of her four grandchildren. Her share of the gifts was valued at $203,560.

Plaintiff's efforts to rebut the statutory presumption were mainly devoted to proof of Mrs. Chotin's unflagging vitality and energy throughout her last years. The proof was made; there is no doubt that Mrs. Chotin lived a full life, with zest, until her unexpected death. She read, entertained, drove her automobile to town to see her grandchildren, did Red Cross volunteer work. She went swimming often, did much of her own housework, ate what she pleased. She traveled extensively with her husband; often a grandchild accompanied them and provided companionship when her husband was too tired. In the spring of 1962, on a cruise to Europe and the Mediterranean, she did not miss a meal and went shopping, sightseeing and to places of amusement as much, or more, as other tourists. In one day in Paris, her diary shows, she toured Versailles by day, "returned to hotel and rested," dined at the Ritz and then went to see the Folies.

The witnesses—the donee-grandchildren and their parents—all testified that Mrs. Chotin never complained of illness or indisposition, never talked of death or of making a will. The absence of such talk completes the picture of a spirited woman filled with the joy of living, and with no taste for self-pity or melancholy. Possession of traits so admirable does not, however, demonstrate or even tend to prove what is required—that the dominant motive for the gifts in question was not the thought of death, but a purpose normally associated with life. *United States* v. *Wells*, 283 U.S. 102 (1931); *Landorf* v. *United States*, *supra*; *Estate of Maurice H. Honickman*, 58 T.C. —, No. 12, April 26, 1972. Plaintiff must prove that "life" motives were "the dominant controlling or impelling" reasons for the transfer, *Allen* v. *Trust Co.*, 326 U.S. 630 (1946). And on this issue, all the "attendant facts and circumstances," including decedent's bodily and mental condition, are relevant. Treas. Reg. § 20.2035-1(c) (1965).

"The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.'" *United States* v. *Wells*, *supra*, 283 U.S. at 118; see Treas. Reg. § 20.2035–1(c) (1965). The transfer may thus be motivated by death, "even though the decedent had no idea that he was about to die." *Allen* v. *Trust Co.*, *supra*, 326 U.S. at 635. Here, however, Mrs. Chotin had good reason, at the time of the gifts in December 1962, to be thinking of her death. For one thing, she had passed her 77th birthday. See *Estate of Ridgely* v. *United States*, 180 Ct. Cl. 1220, 1245 (1967); *Burns* v. *Commissioner*, 177 F. 2d 739, 741 (5th Cir. 1949). More important, she had known for 5 years that she had heart disease; in 1957 and again in 1959 she had been told that she had arteriosclerotic hypertension. In the latter year she was found to have, as well, an "aneurysmal dilation of the abdominal aorta." In 1961 "heart fibrillation" was added to her ills. In that year, too, she developed a bleeding ulcer and underwent a subtotal gastrectomy. While she was in the hospital she had two episodes of heart fibrillation, for which she was given digitalis.

When on returning from the mentioned cruise she visited her doctor in June of 1962, he made this record of her visit:

> Just back from 39 day Mediterranean cruise and had a wonderful time and feels very well and had no GI-Sx except twice when she ate too much and she regurgitated a little. Had palpitation only one time--took TNT and stopped promptly.—Also had a milder episode last week at home and took TNT again—immediate relief both times.

On December 6 of that year, 1962, she had a period of heart palpitation lasting an hour; she had had a milder attack a a few days earlier. On December 9 she had another such episode, this one lasting for about 30 minutes. The gifts in question were made 15 days later, on December 21, 1962. It is in my opinion beyond belief that in these circumstances she

It seems most unlikely that a will was not in mind at the time of the drafting of legal papers to effectuate the gifts; the postponement of will-making is thus not a sign that life motives accounted for the gifts in question. A closeness in time of the execution of a will with the making of a gift, especially where there is, as here, a similarity between the provisions of the two, suggests that the gift, too, is a testamentary disposition. *Oliver* v. *Bell*, 103 F. 2d 760 (3d Cir. 1939); *Commissioner* v. *Gidwitz' Estate*, *supra*; *Davidson's Estate* v. *Commissioner*, *supra*.

Finally, there was some testimony that the gifts were intended to make the grandchildren "secure" and "independent." Such a purpose, if proven, would be dubiously probative on whether the purpose of the gifts was a testamentary disposition. The evidence is in any event general and vague in the extreme and I give it little weight.

The presumption remains unrebutted; the preponderance of the evidence weighs heavily on the side of a gift in contemplation of death, and the suits must fail.

FINDINGS OF FACT

1. These actions are brought by the executor of the estate of Mrs. Irene Scott Chotin, on behalf of the estate, for refund of Federal estate taxes which were assessed against the estate and paid, plus interest thereon. Recovery is sought of $56,886.37, in No. 266–69, filed June 11, 1969, and of $82,545.65, in No. 879–71, filed December 29, 1971. The two cases were consolidated on February 10, 1972.

2. Mrs. Chotin was born on August 2, 1885 and died testate in New Orleans, Louisiana, on February 10, 1965. She had married Joseph Chotin in 1903 and she remained his wife until her death. He survived her and has since died. The decedent and her husband had one child, Joseph Scott Chotin, who is married to Patricia Carter Chotin. They have four children, Linda Chotin Burke, Patricia Chotin (Mrs. William Leche), Joey Chotin (Mrs. Wayne Naquin), and Joseph Scott Chotin, Jr., called Scott, Jr.

3. The estate filed a Federal estate tax return on May 9, 1966. Following an audit, a deficiency was on July 5, 1968 assessed in the amount of $127,807.18 plus interest, and was

paid by the estate. Timely claims for refund were filed and were disallowed, and these suits for refund followed.

4. The claim here originally challenged five adjustments in the tax, four of which have been settled and are no longer in controversy, and the fifth of which was as follows:

> 5) The inclusion in decedent's estate, for Federal estate tax purposes, of one-half of the value, at the time of decedent's death, of certain gifts made by decedent and her husband to four certain trusts, on or about December 21, 1962.

The question for decision is whether the gifts made by the decedent on December 21, 1962 were, in view of decedent's death within 3 years thereafter, on February 10, 1965, made in contemplation of death within the meaning of section 2035, Internal Revenue Code of 1954.

5. Decedent's husband, Joseph Chotin, was during most of his life an owner and operator of towboats, tugs and barges on inland waterways. He had brought his son, Joseph Scott Chotin, into the business with him. At an early time in the business, Joseph Chotin owned one towboat and no barges. By 1971, the Chotin business owned 13 towboats and 167 barges. Shares of stock in two of the Chotin companies, Berwick Bay Towing Co., Inc. ("Berwick Bay") and J. S. Inc. (J & S) were indirectly the subject of the gifts in litigation.

6. As of 1958 Berwick Bay had outstanding 679 shares, of which decedent and her husband owned 280, and their son and daughter-in-law owned a like amount. J & S had 27½ shares outstanding of which decedent and her husband owned 3⅓, their son and daughter-in-law owned a like amount, Berwick Bay owned 15⅚ and Chotin Towing Company, another of the family corporations, owned 5.

7. On September 22, 1958, decedent and her husband and their son and daughter-in-law transferred their shares of stock in Berwick Bay (a total of 560 of the outstanding 679) and J & S (a total of 6⅔ of the outstanding 27½) to a voting trust for 10 years, renewable for another 10 years on a majority vote of the depositing stockholders, under which all voting rights were vested in decedent's husband, Joseph Chotin, and her son, Joseph Scott Chotin. The stock had

previously been made the subject of a stockholder's restrictive sale agreement requiring consent of the other stockholders for a sale of any of the stock by the signatories to any buyer other than the respective corporations.

Voting trust certificates Nos. 1 and 14, representing beneficial interests, respectively, in 280 shares of Berwick Bay and 31⅓ shares of J & S were issued in exchange for the stock deposited by decedent and her husband.

8. On December 21, 1962, the decedent and her husband by notarial acts transferred to each of four irrevocable, identical trusts, one for each of the four grandchildren, an undivided one-fourth interest in voting trust certificates No. 1 and No. 14. Decedent had a one-half interest in the property transferred. These are the gifts in litigation.

9. The trusts, whose terms included spendthrift provisions, provide that income should be payable to the beneficiaries in the discretion of the trustees. The trustees are given a discretionary power to invade the principal for the benefit of a beneficiary. Each trust is to terminate, and the principal and undistributed income be distributed to the beneficiary, on his (or her) reaching 41 years of age, or on his or her death. Upon termination by death the principal will be payable in accordance with the will of the beneficiary, or if no will to the takers on intestacy.

The ages of the four grandchildren at the time of these gifts were: Linda, 20; Patricia, 18; Joey, 16; and Scott, Jr., 12.

No income or principal from the trusts has ever been paid to any of the beneficiaries.

10. The established policy of the Chotin family companies has been not to declare dividends but to retain and reinvest earnings. In accordance with this policy, and not because of lack of earnings, Berwick Bay and J & S have not declared a dividend since they were created in the 1940's.

There were substantial earnings. Between December 31, 1962, about the times of the gifts, and December 31, 1965, the end of the year in which decedent died, Berwick Bay's net worth rose from $851,000 to $1,446,000, and J & S' net worth rose from $908,000 to $1,049,000.

When the Chotin companies merged with a listed corporation in 1971, the Berwick Bay and J & S stock which was

the underlying principal of each trust, originally valued at $101,780, was exchanged for stock with a market price of $346,000 or a total of $1,384,000 for the four trusts which had been valued at $407,120 in decedent's 1962 gift tax return.

11. In the gift tax returns for calendar year 1962 filed by decedent and her husband, an undivided one-quarter interest in the two voting trust certificates was valued at $101,780. The value of the four trusts was thus $407,120, of which decedent had contributed half, or $203,560.

12. The decedent was highly active until her death. She cooked and did housework, including some hand laundering, drove her automobile, climbed stairs, read novels, kept an interest in current events and made bandages for the Red Cross. She visited her country home regularly, where she went swimming frequently. Until 1962 she traveled extensively, in this country and abroad. During a European cruise in 1962, when she was 77, she never missed a meal, ate the same food as others did (though her doctor had at various times put her on a restricted diet for a gastric ulcer), and went shopping, sightseeing and to places of amusement at least equally with the other tourists.

13. Decedent did not display to her family concern about her health, did not give any indication that she ever thought about her death, and did not talk to them about her estate or about making a will.

14. Decedent's mother lived to the age of 96, and three of her sisters (she had seven siblings) survived her and were alive and active, at the time of trial in 1972, aged 82, 80 and 78.

15. Decedent died on February 10, 1965. Her death was caused by "acute heart failure, due to long-standing arteriosclerotic and hypertensive heart disease." Death came unexpectedly while she was in the hospital convalescing from a gastrointestinal upset.

16. On March 28, 1957, the decedent was diagnosed as having arteriosclerotic hypertension; and on March 3, 1959, she was diagnosed as having an aneurysmal dilation of the abdominal aorta, and, again, as having hypertensive arteriosclerotic heart disease. On October 18, 1961, she was diag-

nosed as having a bleeding ulcer and heart fibrillation. She was hospitalized the following December 18 to 31 during which time she underwent a subtotal gastrectomy. During her stay in the hospital, the decedent had two episodes of atrial (heart) fibrillation and was given digitalis.

17. Decedent went to see her doctor on June 27, 1962, on her return from the 1962 cruise. He made the following record of her visit:

> Just back from 39 day Mediterranean cruise and had a wonderful time and feels very well and had no GI-Sx except twice when she ate too much and she regurgitated a little. Had palpitation only one time—took TNT and stopped promptly.—Also had a milder episode last week at home and took TNT again—immediate relief both times.

On December 6, 1962, the decedent had a period of heart palpitation which lasted approximately 1 hour, during which she felt weak and breathless; she had had a milder attack a few days before. On December 9 the decedent had another episode of heart palpitation, this time lasting for approximately 30 minutes.

18. The decedent had made various other inter vivos gifts to her grandchildren, as follows:

(a) Over a period of 15 years, from July 1950 to July 1965, the decedent and her husband gave their grandson, J. Scott Chotin, Jr., 40 bonds having a total face value of $1,750. Over a period of approximately 19 years, from July 1941 to February 1960, the decedent and her husband gave their granddaughter Linda 46 bonds having a total face value of $1,400. Over a period of 18 years, from December 1946 to December 1964, the decedent and her husband gave their granddaughter Joey 39 bonds having a total face value of $1,275. Over a period of approximately 20 years, from October 1943 to December 1963, the decedent and her husband gave their granddaughter Patricia 50 bonds having a total face value of $2,025. A large majority of these bonds had a face value of $25. Thus, over a period of approximately 24 years from July 1941 to July 1965, decedent and her husband gave to their four grandchildren bonds having a total face value of $6,450, or an average of $268.75 per year over

a period of 24 years. Since the gifts of bonds were made jointly, decedent's one-half share of the gifts of bonds averaged $134.68 per year each year for 24 years, a total of $3,225.

(b) Decedent gave her granddaughter Linda clothes of unspecified value from time to time.

(c) Decedent and her husband took their granddaughter Linda on trips with them to South America, New York, San Francisco, Canada, and Washington, D.C.

(d) Decedent and her husband took their granddaughter Patricia on trips to various places in the United States and once to Europe.

(e) Decedent and her husband took their granddaughter Linda out to dinner frequently; and decedent took granddaughters Linda and Patricia to lunch frequently.

(f) Decedent gave granddaughter Linda an automobile of unknown value.

(g) On September 3, 1959, decedent and her husband gave a total of $112,000 to four trusts for the benefit of their four grandchildren. Decedent's one-half share of these gifts was $56,000. These trusts had been established on September 25, 1958, by the decedent's son, Joseph Scott Chotin, and his wife, Patricia. The gift was used by the trustees to buy capital equipment to be rented to a family corporation. In these trusts, income was payable to the beneficiaries in the discretion of the trustees, and no income has ever been paid to the grandchildren-beneficiaries.

19. In a statement filed with the Federal estate tax return by the decedent's estate, Joseph Chotin, decedent's spouse, declared under oath that the primary motive for the donations in trust which he and the decedent made on December 21, 1962 (the gifts in question), was "to further secure the independence of his grandchildren."

20. The decedent's son, Joseph Scott Chotin, testified on trial that the decedent and her husband, Joseph Chotin, had evidenced concern over the future security of his children, their grandchildren, and that the establishment of the four trusts in December 1962 was the beginning of an effort to provide some measure of security for the grandchildren.

ULTIMATE FINDINGS AND CONCLUSIONS

21. Evidence has not been presented to rebut the statutory presumption, under the Internal Revenue Code of 1954, § 2035, that the gifts in question, made within 3 years of decedent's death, were made in contemplation of death.

22. On all the evidence, it appears that the gifts were made in contemplation of death.

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petitions are dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Nos. 266-69 and 879-71

ESTATE OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY
EXECUTOR)

v.

THE UNITED STATES

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These consolidated cases come before the court on plaintiff's brief and exceptions to the recommended decision of Trial Commissioner David Schwartz, filed August 24, 1972 pursuant to Rule 134(h), and upon the brief and request of defendant for the adoption of said decision by the court. The issue is simply whether a transfer of certain property by the decedent, less than three (3) years before her death, was in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code of 1954. Upon consideration of the briefs, exceptions, and oral argument, the court concludes that plaintiff has not overcome the statutory presumption under Section 2035 of the Code nor the presumption of the essential correctness of the findings of the trial commissioner, due regard being had for his opportunity to evaluate the factual evidence. [Rule 147(b)]. While plaintiff's counsel has ably and appealingly presented the claim, since the

court upon careful consideration agrees with the commissioner's decision, copies of which have been furnished to the parties, it hereby affirms and adopts the same as the basis for its judgment in this case.

IT IS THEREFORE ORDERED that plaintiff is not entitled to recover and the petitions are dismissed.

BY THE COURT

Chief Judge

APR 20, 1973

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

412-65	DALE INGRAM, INC., (formerly Florida Builders, Inc.)	)
266-69 & 879-71	ESTATE OF MRS. IRENE SCOTT CHOTIN (JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR)	)
280-69	HARRISON PROPERTY MANAGEMENT CO., INC., ET AL.	) v.) THE UNITED STATES
481-69	MATHER CONSTRUCTION COMPANY, ET AL	)
183-70	UNITED STATES FIDELITY & GUARANTY CO., ET AL	)
175-71	MARION A. SANCHEZ	)

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These cases come before the court on motions for rehearing, reconsideration, new trial, to alter and amend a judgment, for relief from judgment, for clarification, for modification, for leave to file a request for reconsideration and rehearing after expiration of time and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

IT IS ORDERED that said motions be and the same are denied as follows:

412-65 Dale Ingram Inc., (formerly Florida Builders, Inc.) Plaintiff's motion to amend a judgment and for other relief and defendant's motion to alter and amend final judgment pursuant to Rule 151(c).

266-69 & 879-71 Estate of Mrs. Irene Scott Chotin, etc. Plaintiff's motion for new trial and rehearing.

280-69 Harrison Property Management Co., Inc., et al. Plaintiff's motion for new trial and rehearing.

481-69 Mather Construction Company, et al. Plaintiffs' motion for leave to file request for reconsideration and rehearing after expiration of time.

183-70 United States Fidelity & Guaranty Co., et al. Plaintiff's motion for relief from judgment and for rehearing and new trial.

175-71 Marion A. Sanchez. Defendant's motion for clarification, modification, and reconsideration of court's opinion of April 16, 1973.

BY THE COURT

Chief Judge

JUL 13, 1973

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for the petitioner in the foregoing application for writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing application for writ on:

Hon. Erwin N. Griswold
Solicitor General
Department of Justice
Washington. D.C., 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. John Evans
Department of Justice
Tax Division
Washington, D.C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, on this 5th day of October, 1973.

All parties required to be served have been served.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN

SUPREME COURT, U. S.

No. 73-617

FILED
DEC 3 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SUCCESSION OF MRS. IRENE SCOTT CHOTIN (JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor Reneral,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR),
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This estate tax case presents the question whether certain gifts in trust, made by the decedent to her four grandchildren twenty-six months prior to her death, were made "in contemplation of death" within the meaning of Section 2035 of the Internal Revenue Code of 1954. Under Section 2035(b), the value of a gift made within three years prior to the donor's death is includable in the donor's gross estate as a gift in contemplation of death, unless it can be factually demonstrated that the gift was not so made. The statutory phrase "in contemplation of death" encompasses those transfers prompted by the thought of death and is not restricted to an apprehension that death is imminent or

near. Treasury Regulations (1954 Code), §20.2035-1(c). The Trial Commissioner and the full Court of Claims concluded that the gifts in question were made in contemplation of death (Pet. App. A 9-20; Pet. App. B 21-22).

1. The undisputed facts showed that decedent and her husband had a pattern of making inter-vivos gifts of bonds, most bearing a face value of $25, to their four grandchildren, as well as gifts of clothing and travel. On September 3, 1959, decedent and her husband jointly gave a total of $112,000 to trusts for the benefit of their grandchildren; the sum was used to purchase capital equipment to be rented to a family corporation, with income payable to beneficiaries in the discretion of the trustees, who have never paid any income to the grandchildren (Pet. App. A 13, 18, 19).

The gifts at issue were made by decedent in 1962 when she was 77 years of age. The property consisted of voting trust certificates for shares of stock in family corporations which maintained a policy of reinvesting all profits in the business. The property was transferred to spendthrift trusts which provided that income should be payable to the beneficiaries in the discretion of the trustees, who never exercised that discretionary power. Each trust was to terminate when the beneficiary reaches the age of 41 years or upon death[1] (Pet. App. A 15, 16). Three months after the decedent made the gifts in question, she executed a will leaving her property in trust to the same beneficiaries and on terms comparable to those in the gifts here in issue (Pet. App. A 13).

---

[1] At the time of the gifts the beneficiaries ranged in age from 12 years to 20 years (Pet. App. A 16).

During her life, decedent traveled, entertained, swam, drove her automobile, did some of her own housework, and was generally active until the time of her unexpected death, which occurred while she was hospitalized for a gastrointestinal upset. However, during the seven years prior to her death, she had been diagnosed as having arteriosclerotic heart disease, a bleeding ulcer and heart fibrillation. In 1961 she was hospitalized for a subtotal gastrectomy, and during her hospitalization suffered two episodes of atrial fibrillation which were treated with digitalis. The following year she suffered three episodes of heart palpitation (Pet. App. A 17, 18). Decedent was in her 80th year when she died on February 10, 1965, as a result of "acute heart failure, due to long-standing arteriosclerotic and hypertensive heart disease" (*id.* at 17).

2. The question whether a gift is made in contemplation of death is one of fact, *United States* v. *Wells,* 283 U.S. 102; *Allen* v. *Trust Co.,* 326 U.S. 630. Where, as in this case, gift is made within three years of the decedent's death, the taxpayer has the burden of overcoming the statutory presumption that the gift was made in contemplation of death "by a preponderance of the evidence." *Landorf* v. *United States,* 408 F. 2d 461, 472 (Ct. Cl.). Here, there was ample evidence to support the decision below that the decedent's dominant or controlling motive was to make a testamentary-like disposition of some of her property. *United States* v. *Wells, supra,* 282 U.S. at 119; *Allen* v. *Trust Co., supra,* 326 U.S. at 636; *Bel* v. *United States,* 452 F. 2d 683 (C.A. 5), certiorari denied, 406 U.S. 919; *Cleveland Trust Co.* v. *United States,* 421 F. 2d 475 (C.A. 6), certiorari denied, 400 U.S. 819. At the time of the gift, she was 77 years old and had been suffering from heart disease for seven years. Significantly, shortly after the gifts were made, decedent made a will dis-

posing of her property on the same terms to the same beneficiaries. Thus, despite the evidence as to decedent's active life, "[o]ld age and bad health may conclusively establish that the primary motives were not life motives." *Landorf* v. *United States, supra,* p. 473. See also *United States* v. *Wells, supra,* 282 U.S. at 117.

Contrary to petitioner's argument (Pet. 5), the decision below does not conflict with *United States* v. *Wells, supra.* Petitioner apparently contends that because decedent led an active life with no thought of imminent death, the gifts cannot have been made in contemplation of death. But there is nothing in *Wells* which supports the proposition that a gift in contemplation of death cannot be made by a person leading an active spirited life. It is contemplation of death, not contemplation of imminent death, to which the statute refers. As this Court stated in *Wells, supra,* 282 U.S. at 118, in language particularly applicable to this case, "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.' " See also Treasury Regulations (1954 Code), §20.2035-1(c).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12

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SUPREME COURT, U. S.

FILED
DEC 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY
EXECUTOR)

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONER

C. ELLIS HENICAN
Suite 4440
One Shell Square
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70139

COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY
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versus

UNITED STATES OF AMERICA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONER

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent's memorandum in opposition to the petition for writ of certiorari correctly states the law as enunciated by this Court in United States v. Wells, 282 U.S. 102, 118 (1930): "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer." (Emphasis Supplied). (Mem.,p.4).

However, this court made it clear that:

> "The question necessarily is as to the state of mind of the donor." (283 U.S. 117, Emphasis Supplied).

The testimony of decedent's family (Transcript, pp. 40, 94, 157), her physician's statement (Joint Exhibit 2L, p. 6), and the testimony of the attorney who prepared the notarial act of donation (Pl. Ex. 23, p. 19), established that the decedent was not concerned about dying, nor was she, by disposing of her property, preparing for that eventuality.

Although decedent died in her 80th year (2 years and 1-2/3 months after the donations in question), "most likely" from "acute heart failure, due to long-standing arteriosclerotic and hypertensive heart disease" (Joint Exhibit 2L, p. 6), the decedent's medical record shows that she was never hospitalized for treatment of any heart disease. (Joint Exhibit 2).

Moreover, the heart palpitation referred to in the Trial Commissioner's Findings 16 and 17 (Pet. App. A 17, 18), was diagnosed as "paroxysmal tachycardia" (Joint Exhibit 2E-3). In Lawyers' Medical Cyclopedia, Revised Volume 5A, at page 238, this disorder is described as follows:

> In "atrial (or auricular) paroxysmal tachycardia," an area of one of the atria (other than the sinus node) sends out a very rapid series of impulses which overshadow those of the sinus node, and the heart contracts in response to both series of impulses. The heart rate will

> be very rapid - from 120 to 250. This disturbance is characteristically of sudden onset. Also, when it ceases of its own accord, it ceases abruptly. This type of arrhythmia is more common in young people and is not usually associated with serious heart disease; however, it may occur in hypothyroidism, heart disease, and other conditions.
>
> Most patients with arterial paroxysmal tachycardia are aware of the very rapid heartbeat. Also, they may feel weak, breathless and nervous . . .
>
> Digitalis, quinidine, pronestyl, sedatives, and other drugs are used in treatment of atrial paroxysmal tachycardia. Prevention of recurrence involves treating the underlying disease.

In Lawyers' Medical Cyclopedia, Revised Volume 5A, page 220, is found the following description of arteriosclerotic hypertension:

> The term "hypertension (high blood pressure) refers to an elevated pressure in the arterial system . . .
>
> Systolic hypertension is a frequent finding in older people. This form is thought to be the result of arteriosclerosis

> with its attendant decrease in the elastic character of the aorta and the medium-size arteries. This is a benign disorder, which usually requires no treatment, and is considered to be a consequence of the aging process.

The respondent's memorandum in opposition to the petition for writ of certiorari refers to two episodes of heart fibrillation during decedent's hospitalization in 1961. This condition is described in Lawyers' Medical Cyclopedia Revised Volume 5A, at page 239, where it is said that this disorder:

> . . . occurs very often with mitral stenosis, hyperthyroidism, and senile heart disease; but it may occur transiently and sporadically (paroxysmal atrial fibrillation) in people with no evidence of organic disease . . . Treatment of the condition is directed toward the underlying disorder and control of the rapid ventricular rate . . . quinidine sulfate or other drugs may be used in an attempt to convert the rhythm to a normal sinus rhythm.

There is no evidence that the decedent had been told that she had arteriosclerotic hypertension prior to December 21, 1962, the date of the gifts in question.

Decedent's activities during the

year 1962 gave no indication that she was concerned about her health. Surely, no one who considered herself seriously ill would have undertaken a six-week Mediterranean cruise, which included extensive and strenuous sightseeing, visits to Paris, its famous restaurants and nightclubs, shopping while in Italy, walking to a much greater extent than even her husband could do, and taking delight in all of the shipboard activities (Pl. Exhibit 21). Nor would her doctors have permitted her to undertake such extensive travel had they considered her heart condition at all serious. Her visits to the doctor and hospital were all the result of the gastric ulcer from which she suffered, the recurrence of the problems it caused, and the operation to correct the condition. When she was admitted to the hospital in 1965, where she died on February 10th, it was for acute gastroenteritis, not heart disease. There is no evidence in the entire record from which it might be reasonably concluded that decedent knew that she was seriously ill, if, indeed, she was at the time of the disputed donations.

Moreover, one of the physicians who saw the decedent considered the fibrillation as being related to the "dumping syndrome". (Joint Exhibit 2G, p. 2). This is a condition which may follow "subtotal gastrectomy". The symptoms are weakness, dizziness, nausea and vomiting. Lawyers' Medical Cyclopedia, Vol. 4, p. 188.

As stated in United States v. Wells, 283 U.S. 102, 113:

. . . The best evidence of the

> state of decedent's health at the time the transfers were made is the statement of his doctor.

The record in this case contains the following statement of Mrs. Chotin's physician:

> Mrs. Irene Scott Chotin was under my care from 1949 until her death on February 10, 1965. There was no autopsy, but the most likely cause of death was acute heart failure, due to longstanding arteriosclerotic and hypertensive heart disease.
>
> Death came abruptly in Oschsner Foundation Hospital where she was convalescing from a gastro-intestinal upset, and until the moment of death she was in possession of all of her faculties and was quite alert. Mrs. Chotin was unusually cheerful and active despite her years, and if the thought of death ever entered her mind, even to the very last, I never detected any inkling of it.
>
> There was no new development in December 1962 to cause Mrs. Chotin to have any serious anxiety about her health.
>
> In spite of her 78 (or 79) years, Mrs. Chotin was remarkably alert and active mentally and physically and she frequently spoke of her plans for various activities and travel in the future. I doubt

> that Mrs. Chotin ever fully realized the gravity of her illness, or that the likelihood of impending sudden death entered her mind. (Emphasis Supplied). Joint Exhibit 2L, p. 6).

Finally, it is submitted that the question is not so much the actual physical condition of the donor, but rather the donor's attitude toward her physical condition and her outlook and plans for life. It was error for the Trial Commissioner to substitute his attitude toward the decedent's illness for the decedent's own attitude toward her physical condition, which was primarily due to the aging process, and which, therefore, was not alarming to the decedent.

The presumption created by Internal Revenue Code §2035 was evaluated by Judge Downey in Meyer, et al. v. The United States, 60 Ct.Cls. 474, 483 (1925):

> . . . The question necessarily involves the determination of a mental state, and that, too, the mental state at a given time of one who, at the time the question is for determination, has passed from life. The difficulties are therefore apparent. In the absence of proof as to express declarations of the decedent - seldom, we may assume, available to the Government - the burden of affirmative proof could but rarely, if ever, be successfully

assumed; and wisely, therefore, and perhaps of necessity also, the law has relieved the Government, under the conditions stated, of the burden and created the presumption.

But what is the result? Can it go further than to shift the burden of proof, leaving the presumption to prevail in the Government's favor in the absence of a reasonable showing to the contrary? Taxing statutes, when of doubtful interpretation, are always to be construed in favor of the taxpayer, and the spirit of this rule must be completely ignored if, in determining a question of fact as between the Government and the taxpayer, rigorous rules as to the proof required to overcome the presumption of the law are to be applied. For if the Government was deemed entitled to a presumption in its favor because of the difficulties of proof, it is to be borne in mind that even though a conveyance was in fact not in any degree made in contemplation of death, the personal representatives might and frequently would be beset by many difficulties in proving that negative fact. Circumstances must largely be relied upon, and these should be fairly - indeed, we think liberally - construed in favor of the taxpayer.

Moreover, the Trial Commissioner erroneously concluded that "the preponderance of the evidence weighs heavily on the side of a gift in contemplation of death." There is not a scintilla of evidence that Mrs. Chotin, in making the gifts in question, was motivated by purposes associated with the distribution of property in anticipation of death. The evidence overwhelmingly shows that Mrs. Chotin was not in a testamentary frame of mind when the donations were made.

> The presumption created by the statute . . . cannot stand against ascertained and proven facts showing the contrary to be true. (United States v. Wells, 283 U.S. 102, 113).

Treasury Regulations §20.2035-1(c) define the phrase "in contemplation of death". Such a transfer is a disposition prompted by the thought of death, even if there are other reasons for the transfer. Thus, to be "in contemplation of death", the transfer must be made: (1) to avoid estate taxes; or (2) as a substitute for a testamentary disposition; or (3) made for any other death-associated motive.

In this case, the record clearly establishes that Mrs. Chotin (1) had no thought of avoiding estate taxes, (2) had never discussed giving away her property or making a will, and (3) had no death-associated motive for making the transfers in question. Therefore, the gifts cannot be said to have been in contemplation of death.

For the reasons set out above, as

well as those stated in the petition for writ of certiorari, petitioner prays that the petition for writ of certiorari be granted.

(ORIGINAL SIGNED)
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioner, in the application for writ of certiorari and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing Reply for Petitioner on:

Hon. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, this 13 day of December, 1973.

All parties required to be served have been served.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN